

disability. The Appeals Board adopts the findings of the Administrative Law Judge on all other issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board agrees with the decision of the Administrative Law Judge limiting the disability to functional impairment but concludes that it is appropriate in this case to award claimant benefits based upon a nineteen percent (19%) permanent partial impairment of function. As a result of injuries arising out of and in the course of her employment claimant underwent ulnar surgery on her right arm in July of 1992 and on her left arm in August of 1992. She underwent carpal tunnel surgery for her right hand in October of 1992, but declined the recommended surgery for her left hand because she felt that the surgery on her right had not helped significantly. She also suffered an overuse syndrome in her shoulder girdle with symptoms which included constant crepitus.

Claimant was evaluated and rated by Drs. Mills, Schlachter, and Welch. Dr. Schlachter testified that in his opinion claimant has a ten percent (10%) permanent partial impairment of function to the body as a whole due to her right shoulder, a twenty percent (20%) impairment to the right upper extremity which equates to twelve percent (12%) to the body as a whole, and a fifteen percent (15%) impairment to the left upper extremity which equates to nine percent (9%) to the body as a whole. He combined the percentages to arrive at a twenty-eight percent (28%) permanent partial impairment of function to the body as a whole. Dr. Mills felt claimant had suffered a ten percent (10%) permanent partial impairment of function to the body as a whole. Dr. Welch, a neurologist, concluded that claimant suffered no permanent disability in spite of the various surgeries. In his opinion, claimant has a conversion anxiety depression reaction.

Both Dr. Mills and Dr. Schlachter recommended restrictions on the claimant's work activities. Dr. Welsh did not. Dr. Schlachter recommended that she lift no more than 10 pounds on a single basis with the right arm and 15 pounds on a single basis with the left arm. He also recommended that she lift no more than 5 pounds on a repetitive basis with the right arm and 10 pounds on a repetitive basis with the left arm. He indicated she should avoid vibratory tools and cold environments. In his opinion, her work activities had caused the conditions he diagnosed. Dr. Mills stated that she should avoid repetitive pushing, pulling, lifting, vibratory tools, and temperatures below 50 degrees without suitable clothing. According to Dr. Mills it was not so much the weight as it was the repetitive activities which she would not be able to tolerate.

The initial issue to be determined is whether claimant, with her restrictions, could have continued to perform the light testing work after her injury and surgery. This was work at a comparable wage which claimant did perform for a period after her surgery and which respondent offered to allow her to continue. Respondent has provided a video tape showing the light testing work. Claimant has testified that she was unable to continue to perform these duties. From a review of the video tape it appears that that job does not require lifting which would violate the restrictions recommended by Dr. Schlachter. Whether the work violates other restrictions is a matter subject to interpretation. The Administrative Law Judge has emphasized in his award that he has denied benefits for a work disability in large part based upon his evaluation of the credibility of the claimant's testimony that she could not continue to perform these duties.

In this case there is a presumption of no work disability because claimant had, in fact, returned to work and engaged in work after the injury at a wage the same as that she earned prior to the injury. See, K.S.A. 44-510e (1992 Supp.). The question is whether her

testimony that she was unable to continue to perform those duties overcomes that presumption. The Administrative Law Judge has had the opportunity to observe the claimant. The Appeals Board believes it may, therefore, give some weight to his evaluation of her credibility. See, Kroger v. Morris, 14 Va. App. 233, 415 S.E.2d 879 (1992). Based upon that evaluation, as well as evidence in the record relating to the severity of her injury and evidence of the nature of the job she performed upon her return to work, the Appeals Board concludes the claimant could have continued to perform the duties at a comparable wage and is, therefore, limited to benefits based on functional impairment only.

In evaluating the functional impairment, the Appeals Board disagrees with the opinion of Dr. Welch as there is convincing evidence of disability following the surgeries performed. Dr. Mills has not included disability in the shoulder, and the Appeals Board believes, based upon the objective finding of crepitus and Dr. Schlachter's diagnosis of rotator cuff tendinitis, that the right shoulder should be included. The Appeals Board considers it appropriate to split the difference between Dr. Schlachter's and Dr. Mills' ratings. The result is a nineteen percent (19%) permanent partial impairment of disability which the Appeals Board considers an appropriate basis for the award in this case.

AWARD

WHEREFORE, an award of compensation is hereby entered in favor of the claimant, Gayle Snow, and against the respondent, Sanofi Winthrop, and the insurance carrier, Pacific Employers Insurance Company.

The claimant is entitled to 20.86 weeks temporary total disability at the rate of \$299.00 per week or \$6,237.14 followed by 394.14 weeks at \$92.21 per week or \$36,343.65 for a nineteen percent (19%) permanent partial general body disability making a total award of \$42,580.79.

As of May 20, 1994, there would be due and owing to the claimant 20.86 weeks temporary total compensation at \$299.00 per week in the sum \$6,237.14 plus 67.43 weeks permanent partial compensation at \$92.21 per week in the sum of \$6,217.72 for a total due and owing of \$12,454.86 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$30,125.93 shall be paid at \$92.21 per week for 326.71 weeks or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled to medical expenses, and any unauthorized medical expenses if any.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed the respondent, and such are directed to pay costs of the transcripts as follows:

TODD REPORTING		
Deposition of Jerry D. Hardin, Dated June 16, 1993		\$ 200.00
Deposition of Dr. Ernest R. Schlachter, Dated July 13, 1993		<u>\$ 119.90</u>
TOTAL		<u>\$ 319.90</u>

GAYLE SNOW

4

DOCKET NO. 170,302

IRELAND COURT REPORTING Deposition of Dr. Philip Mills, Dated October 26, 1993	\$ 158.70
DON K. SMITH & ASSOCIATES Deposition of Dr. Lauren Welch, Dated December 17, 1993	\$ 149.50
OWENS, BRAKE & ASSOCIATES Regular Hearing Transcript, Dated November 4, 1993	\$ 253.12
Deposition of Joel Nelson, Dated January 6, 1994	\$ 116.61
Deposition of Lawrence Smith, Dated January 6, 1994	<u>\$ 115.26</u>
TOTAL	\$ 484.99

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, 1861 N Rock Road, Suite 320, Wichita, Kansas 67206
Kirby A. Vernon, 600 Epic Center, 301 N Main, Wichita, Kansas 67202
George R. Robertson, Administrative Law Judge
George Gomez, Director